Supreme Court, U.S.
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No. 99-47

In The

Supreme Court of the United States

GABRIEL RUVALCABA,

Petitioner,

vs.

CITY OF LOS ANGELES and DARYL F. GATES, Chief of Police, in his personal and official capacity, etc., et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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JURISDICTION

Respondents City of Los Angeles and Daryl Gates do not contest this Court's jurisdiction over this petition pursuant to 28 U.S.C. section 1257(a).

STATEMENT OF THE CASE

Respondents City of Los Angeles and Daryl Gates respectfully submit that the published opinion of the California Court of Appeal contains an accurate description of the proceedings below. Pet. Apx. A3-A6. However, because petitioner has discussed the facts at length, but not always correctly, respondents will provide a brief overview of the case.

Los Angeles Police Officers responded to a radio call that a burglary was taking place at the Mayan Theater at approximately 3:00 a.m. on May 28, 1989. (Supplemental Excerpts of Record on Appeal (hereinafter SERA) 34, 36; II Reporter's Transcript on Appeal (hereinafter RT) 162, 182.) Officer Morales was met by employees of the theater who told him that an ex-employee had locked himself inside the theater, would not come out, had a pipe and was possibly armed with a gun. (SERA 37; II RT 186:13-23.) The officers decided to request the assistance of a canine unit to apprehend the suspect. (SERA 38; II RT 187:1-7.)

Several announcements were made by Officer Morales and Officer Moore in both English and Spanish demanding that the suspect surrender and warning that a canine unit had been summoned. The front doors of the

theater were chained closed but Officer Moore could push them about six to eight inches apart and yelled through the opening into the front of the theater. (SERA 23, 32; II RT 124:1-3; 144:2-6.) He identified himself as a police officer, and stated "I'm calling the dogs, come out before they come." (SERA 23; II RT 124:14-20.) Officer Morales made his announcements in the same manner in Spanish. (SERA 32, 34-35; II RT 144:14-24; 162-163.) After a manager had arrived to open the rear door of the theater, additional announcements, in both English and Spanish, were made from the rear door. (SERA 24; II RT 125:1-4; 145:3-9.)

When Officer Martin Coon arrived with his canine partner, Smokey, he was informed by Officers Moore and Morales that warning announcements had already been made. (SERA 2-4, 27-28; I RT 18-20; II RT 128:24 to 129:8.) Coon entered the theater with the dog through the rear door and did not make any additional announcements of his presence because warnings had already been given and no response had been received. (SERA 51-52, 54; III RT 292-293; 297.) The dog was let off his leash so as not to impair his ability to search (SERA 52-53; III RT 293-294), and Officers Moore and Morales followed Coon into the theater in back-up positions. (SERA 51; III 292:19-22.) In the twenty to thirty minutes the officers were searching the theater, no additional announcements were made or warnings given. (SERA 2; II RT 18:4-8.)

Officer Coon testified that, after searching most of the theater, his dog "alerted" on a portion of the lobby wall. (SERA 53; III RT 294:13-25.) When he noticed a door, he opened it and entered an office, allowing the dog to go in first. (SERA 54; III RT 297.) The office was dark and the

dog approached the suspect who was hiding behind a desk on all fours. (SERA 55-56; III RT 298-299.) The suspect started screaming and lunged at the dog, grabbing him and attempting to throw the dog against the wall. (SERA 57; III RT 300.) In the encounter, the suspect was bitten (SERA 57-58; III RT 300-301), and he fell against the desk striking his chest. (SERA 15; II RT 22:22-25.) Officer Coon called off the dog when the suspect complied with his order to stop fighting the dog. (SERA 58; III RT 301.) The altercation took approximately seven to ten seconds. (SERA 59; III RT 302:10-13.)

Petitioner Gabriel Ruvalcaba testified that he was sleeping on the floor of the theater office when he became aware of a pain in his right leg and woke to find a dog biting him. (ERA 289-8 to 289-9; III RT 21-22.) He sat up and, to defend himself against the biting, stuck his hand in the dog's mouth and tried to bite the dog. (ERA 289-9 to 289-11; III RT 22-24.) The dog continued biting him for five to ten minutes. (ERA 289-13; III RT 26:1-6.) He felt blows to his head and ribs. (ERA 289-10 to 289-11; III RT 23-24.) Appellant never testified that he was kicked by anyone and never identified Officer Coon as the person who struck him.

It is clear from the testimony of all involved that Officer Coon was the only Los Angeles Police Officer in the room with appellant at the time of the encounter between appellant and the dog (SERA 46, 48, 49; III RT 111:3-11; 136; 191), although Coon denied kicking or striking appellant. (SERA 60; III RT 303.) Officer Moore testified that he came into the office to handcuff the suspect. (SERA 29-30; II RT 136-137.) It was dark and he thought the suspect was face down and dropped to his

knee to complete the handcuffing. (SERA 30; II RT 137:1-20.) He realized too late that the suspect was face up and his knee landed in the suspect's right chest area. (SERA 30-31; II RT 137-138.)

Petitioner was initially seen by a doctor at the jail dispensary. Jail records showed that petitioner reported consuming a substantial amount of alcohol the night of the incident – "15 beers and one-fifth of tequila." (SERA 162; III RT 190.) Petitioner was transferred to County General Hospital approximately 36 hours after being taken into custody and was treated for fractured ribs as well as injuries from the dog bites. (SERA 153-155; II RT 224-226.)

Petitioner prevailed in the court below, securing a jury determination on a general verdict that defendant Coon violated his civil rights by using excessive force in arresting him and that this force was the proximate cause of his injuries. (Apx. A7-A8.) In response to special interrogatories, the jury determined that the excessive force used by Coon was not due to the use of his dog, but was due to Coon's having kicked or struck the plaintiff. (Apx. A9-A10.) Petitioner was awarded judgment in the amount of $60,400 in compensatory damages and $5,000 in punitive damages. (ERA 316-317.) The judgment was paid, along with costs, interest and attorney's fees in the amount of $67,088.25. (SERA 140-143.)

REASONS FOR DENYING THE WRIT

This writ should be denied because petitioner's issues do not accurately reflect the evidence presented at trial and do not meet the threshold criteria for certiorari.

A. THE EVIDENCE IN THIS CASE DOES NOT SUPPORT THE FACTUAL HYPOTHESES UPON WHICH THE QUESTIONS PRESENTED ARE BASED.

In the "Questions Presented" portion of petitioner's brief (Petition, p. i), he contends that this Court should grant certiorari to address whether he is entitled to proceed with his *Monell* claim [*Monell v. Dept. of Soc. Serv. of City of New York*, 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978)] "[w]here a city police officer . . . claims that his conduct was objectively reasonable . . . because he followed city policy and practice . . . ", whether a city police officer should be " . . . permitted to rely on his following city policy or practice to show that his actions were objectively reasonable under the Fourth Amendment . . . ", and whether he should be allowed to show that the city policy and practice is not reasonable where a city police officer " . . . relies on his following city policy and practice to show that his actions were reasonable,. . . . " The evidence in this case does not support these factual hypotheses, however, and the courts below neither addressed nor decided the case based on petitioner's hypothetical factual recitations. The entire evidentiary basis alleged in support of the Petition is therefore unsound, and a grant of certiorari would not be appropriate.

Petitioner argues that Officer Coon was allowed to mount a "following orders" defense and to assert that he was acting in accordance with departmental policy. The flip side of this argument is petitioner's contention that he should have been permitted to challenge Coon's "policy defense" with evidence critical of the City's policies. This argument misstates the nature of the evidence which was proffered by defendants.

Petitioner was unable to cite any place in the evidentiary record where Coon attempted to excuse his conduct or disclaim responsibility for his decisions based on a superior's orders. The majority of references to the record highlighted in the Petition focus on testimony concerning the making of warning announcements before a search was commenced. Many of the "policy" references were solicited by petitioner on his counsel's examination, and many others, to the extent they discuss "policy," refer to general concepts applicable to canine searches rather than hard and fast policies directing a particular course of conduct.

Petitioner asserted that the "following orders" defense was presented through Deputy Chief Mark Kroeker who was called as a witness by petitioner and questioned regarding the City's use of force policy and whether or not deployment of canines was considered, or should be considered, a use of force. (II RT 55-78.) He was not asked whether Coon should be exonerated because he was following departmental policy at the time of this incident and did not comment on the events surrounding petitioner's arrest.

Petitioner asserted that the "following orders" defense was also presented through Sergeant Donn Yarnall who was the chief trainer for the canine platoon and was responsible for the creation of the unit. (SERA 76-79; IV RT 46-49.) Petitioner examined Coon and the other police officers present at the scene extensively on the question of whether and when announcements or warnings were given before deployment of the dog to search for petitioner. (SERA 1-4, 6-13, 16-18, 23-28, 32-35, 39; I RT 17-20; II RT 13-20, 107-109, 124-129, 144-145, 162-163, 188.) When Coon testified on his own behalf, petitioner's cross-examination elicited the first reference to policy or practices. Petitioner asked Coon: "Was it your practice to make an announcement before commencing a search for a person?" (SERA 61; IV RT 12:7-8.) The officer replied that it was up to the discretion of the handler, "as our policy dictated." (SERA 61; IV RT 12:13-16.) Coon was quizzed about his practice of making announcements when the suspect to be sought was believed to be armed. (SERA 62-72; IV RT 13-23.) Coon was asked whether it was important to record in his reports whether he had made an announcement and whether he had been instructed that he was to record those facts which would enable his supervisor to evaluate whether he had used his dog in accordance with departmental guidelines and policies, to which the officer responded affirmatively. (SERA 74-75; IV RT 25-26.)

When Yarnall was later called to testify, he was asked whether departmental policies concerning making warning announcements prior to a search left such matters up to the officer's discretion. (SERA 80-81; IV RT 58-59.) This testimony was clearly sought as a response to petitioner's

emphasis on the entire issue of warning announcements, and no evidence was adduced to the effect that Coon's conduct was proper because he had followed departmental policy. Petitioner also cited other testimony from Yarnall in support of his contention that a "following orders" defense was mounted, but the record does not support this contention. Brief references to what normally happens at the scene of a search (ERA 289-25; IV RT 66), the use of patrol officers as back-up during the search (ERA 289-27; IV RT 71), whether the canine officer or the patrol officer is considered to be in charge of the search (SERA 82; IV RT 72), the fact that the handler directs the search by the dog (ERA 289-28; IV RT 73), and the practice of taking the dog off the leash (ERA 289-29; IV RT 74), do not amount to a "policy" defense attempting to excuse the officer's conduct. Neither were the policies themselves defended and no opinion was offered whether they were appropriate or proper or constitutional. Instead, the defendants' testimony simply attempted to explain to the jury what had happened at the scene and why.

In contrast, the evidence which petitioner sought to have admitted went directly to the issue of the municipal defendants' *Monell* liability and was properly excluded from the liability phase of the trial. Evidence of Coon's "bite rate" or the rate of hospitalizations for persons arrested by the canine unit as opposed to arrests by other units may have been relevant to support the contention that the City's policies allowing deployment of police dogs were unconstitutional, but it was not relevant to the issue of whether excessive force was used to secure petitioner's arrest.

Attempting to unravel the logic chain of petitioner's argument, respondent believes the argument is essentially a camouflaged complaint that references to City canine policies constituted an improper qualified immunity defense. Coon's motion for judgment on qualified immunity was denied by the court, however (SERA 86-93d; V RT 49-60), and no argument or instruction was presented to the jury which would have allowed them to conclude that the officer would be immune for using excessive force because his dog seized petitioner in a manner consistent with City canine policies.

Petitioner's reliance on *Wilson v. Layne*, ___ U.S. ___, 119 S.Ct. 1692, 143 L.Ed.2d 818 (1999), is unhelpful. Petitioner contends that *Wilson* supports his argument that the jury may have interpreted Coon's "just following orders" defense to conclude that his conduct was constitutionally reasonable. (Petition, pp. 10-11) Leaving aside for the moment the question of whether the evidence actually supports the factual basis of this argument, *Wilson* cannot be read to say that presentation of evidence that a police officer's conduct was consistent with departmental policies is equivalent to presentation of a qualified immunity defense. (Petition, p. 11) Rather, *Wilson* simply determined that the officers in that case were entitled to qualified immunity because the law on third-party entry into homes with police officers was not clearly established. *Wilson v. Layne, supra* at 119 S.Ct. p. 1700.

The factors which this Court considered in determining whether the law was clearly established included the fact that the constitutional question was not "open and shut", there were no judicial opinions holding the practice unlawful, and both federal and state law enforcement

units had policies allowing third parties to enter private homes with police. *Id.* at 119 S.Ct. pp. 1700-1701. The Court then opined that a law enforcement officer's acts in furtherance of departmental policy would not make his conduct "objectively reasonable" (i.e., he would not be entitled to qualified immunity) if the conduct was contrary to a decided body of case law. *Id.* at 119 S.Ct. p. 1701. That is clearly not the situation in the case at bar since *Chew v. Gates*, 27 F.3d 1432 (9th Cir. 1994), decided many years after the incident in this case occurred in 1989, determined that the law simply was not clearly established that L.A.P.D. policies regarding the use and training of police dogs contravened a suspect's constitutional rights. *Id.* at 27 F.3d pp. 1448-49.

Ultimately, the entire argument that Coon mounted an improper defense was proved moot in light of the fact that the jury returned a verdict in petitioner's favor and found that Coon violated his constitutional rights. Moreover, the Ninth Circuit agreed that petitioner should have been permitted to proceed with his *Monell* claim in spite of the jury's answer to the special interrogatory. The court determined that petitioner should be allowed to attempt to prove that Coon's actions in using excessive force against petitioner were in furtherance of the City's dog-bite policy. (Apx. A19) All of the evidence concerning bite rates, and hospitalizations, etc., will in all probability be admissible during this portion of the case.

In short, then, this case does not identify any issues appropriate for resolution by this Court on certiorari. The factual predicate for the questions posed by petitioner is not demonstrated by the record of evidence adduced below and reviewed by the Ninth Circuit. Even if one can

say that the parties differ with regard to their interpretation of testimony below, questions concerning the persuasiveness and substantiality of the evidence do not constitute an "important federal question" justifying this Court's review on certiorari. *Donaldson v. United States*, 400 U.S. 517, 522, 91 S.Ct. 534, 538, 27 L.Ed.2d 580 (1971). For this reason alone, the issue is unworthy of review. And, finally, the ultimate remedy sought by petitioner, the opportunity to continue his case and to prove that the city dog-bite policy caused his injury, has been granted by the Ninth Circuit. The case has been remanded to the district court and petitioner is pursuing his *Monell* cause of action. Accordingly, certiorari should be denied.

B. THE COURT'S BIFURCATION ORDER IS NOT AN ISSUE IN THIS PETITION AND PETITIONER HAS PROPERLY BEEN LIMITED TO NOMINAL DAMAGES ON REMAND UPON PROOF OF AN UNCONSTITUTIONAL *MONELL* CLAIM.

Petitioner complains that the bifurcation of the issue of liability from the *Monell* cause of action in the trial court, and the finding on the special interrogatory that the use of the dog was not excessive force, improperly prevents him from recovering anything more than nominal damages against the City of Los Angeles if he proves his *Monell* claim on remand. (Apx. A20-21) However, the "Questions Presented" portion of the Petition does not pose any issue with regard to the practice of bifurcation. Petitioner's concluding argument that the practice of

bifurcation has diluted a jury's "constitutional reasonableness" inquiry and has insulated Fourth Amendment seizures from scrutiny is therefore not only unfounded but not appropriate for review on certiorari in this case. (Petition, pp. 12-14) Quite simply, this is the wrong case to serve as a vehicle for such an inquiry.

Petitioner attacked the practice of bifurcation below without success. Bifurcation is appropriate if it simplifies issues for the jury or avoids unnecessary jury confusion. *Hirst v. Gertzen*, 676 F.2d 1252, 1261 (9th Cir. 1982). Convenience and judicial economy alone justify bifurcation. *Ricciuti v. New York City Transit Authority*, 796 F.Supp. 84, 86 (S.D. N.Y. 1992). A court's decision to bifurcate issues and order separate trials may be reversed only for an abuse of discretion. *DeAnda v. City of Long Beach*, 7 F.3d 1418, 1421 (9th Cir. 1993). The Ninth Circuit below did not address this allegation of error by petitioner and, impliedly, found no abuse of discretion in the bifurcation order made here.

Moreover, as explained above, the record does not support the assertion that Officer Coon ever claimed, either expressly or by "obvious implication," that his use of the dog to search for petitioner, or his conduct once petitioner was found, was "objectively reasonable." The jury was not instructed on the issue of qualified immunity and cannot be presumed to have ignored their instructions [*City of Los Angeles v. Heller*, 475 U.S. 796, 798, 106 S.Ct. 1571, 89 L.Ed.2d 806 (1986)] and found the use of the dog to seize petitioner not unreasonable simply because Officer Coon was a member of a "paramilitary organization" and expected to act in accordance with his training. (Petition, p. 14)

Petitioner's contention ultimately founders on the rock of the jury's finding of liability against Officer Coon. The jury was asked by general verdict whether Officer Coon violated petitioner's constitutional rights by using excessive force and the jury answered "yes." Although the court sought, by use of the special interrogatory, to foreclose further litigation on petitioner's *Monell* claim by determining whether the jury had made any distinction between the force which broke petitioner's ribs and the dog bites, the Ninth Circuit determined that the dismissal of the *Monell* claim was error and petitioner is even now prosecuting that cause of action. Whether petitioner has been prevented, by that error, from recovering damages for his injuries caused by the dog attack is moot in light of the fact that he has been fully compensated for all of his injuries and is not entitled to double recovery.

In the trial court, petitioner argued to the jury that he should be awarded $32,000 ($8,000 a year times four years) for lost earnings and injury to his ability to be self-supporting, and $75,000 ($5,000 a year times 15 years of earning capacity) for pain and suffering and the loss of self sufficiency. (SERA 144-146; X RT 170-172.) The injuries for which petitioner wished to be compensated, therefore, were "general" in the sense that they were not limited to only those injuries, or portions of injuries, attributable to the officer's tort as opposed to the dog bite. The jury eventually awarded him $60,400 in compensatory damages (ERA 316), almost two-thirds of what he asked for, as well as $5,000 in punitive damages.

Petitioner was allowed to and did put on all damages evidence he possessed concerning the injuries he received during the encounter with Officer Coon and the police

dog. No attempt was made, either in the presentation of evidence, instructions to the jury, or argument by any counsel, to separate petitioner's injuries or to require the jury to apportion its award between damages attributable to the officer personally and those attributable solely to dog bites. Petitioner has presented no authority, either below or in this Petition, which would support his contention that he should be allowed to prove and recover additional damages (other than nominal damages) from the City if he establishes that the City's dog bite policies caused or contributed to the use of excessive force by Officer Coon. The unavailability of additional damages on remand presents no issue justifying review by this Court, and the Petition should be denied.

CONCLUSION

For all of the above reasons, the petition for certiorari should be denied.

DATED: October 13, 1999

Respectfully submitted,

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